111-363

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 306.

JOHN I. BLAIR, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF CUMING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 24, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 306.

JOHN I. BLAIR, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF CUMING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.

	Original.	Print.
Petition	1	1
Demurrer to petition	16	10
Order sustaining demurrer and judgment for defendant for costs	17	10
Bond	18	11
Writ of error	20	12
Citation	21	13
Acceptance of service	22	13
Certificate of clerk	23	13

1 In the Circuit Court of the United States for the District of Nebraska.

JOHN I. BLAIR, Plaintiff,
vs.
THE COUNTY OF CUMING. } Petition.

The said John I. Blair, who is a citizen of the State of New Jersey, residing at Blairtown in said State, plaintiff, complains of the said The County of Cuming, a body corporate, organized and existing under and by virtue of the laws of the State of Nebraska, in the district of Nebraska aforesaid, and a citizen of the State of Nebraska, defendant, and says:

I. That heretofore, to wit, on the first day of September, A. D. 1875, at the district aforesaid, the defendant The County of Cuming made, executed, and delivered its certain sixteen instruments in writing commonly called coupons or interest warrants, numbered respectively as follows: Numbers 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, and 59, each for the sum of twenty-five dollars, and payable to the bearer on the first day of July, A. D. 1877, at the National Park Bank, in the city of New York, each and every of said coupons or interest warrants being signed by Thomas Roeh, clerk of the said county of Cuming, and are fac similes of each other except as to their numbers, and represent and were for the semi-annual interest due on sixteen certain bonds bearing even numbers with said coupons, dated the first day of July, A. D. 1875, and which said coupons are of the same tenor and effect and were except as to the numbers in words and figures following, viz:

2 $25.00 $25.00.

The West Point Precinct, Cuming County, State of Nebraska, will pay the bearer twenty-five dollars at the National Park Bank, in the city of New York, on the first day of July, 1877, on bond No. 43.

No. 43. THOMAS ROEH, *Clerk.*

And the said plaintiff avers that the said bonds, and each and every of them, from which said sixteen coupons were detached, are special bonds of the said county of Cuming, issued by its board of county commissioners in behalf of West Point precinct, a voting district within and a part of the said county of Cuming, in accordance with the provisions of chapter thirty-five, general statutes of Nebraska, and were alike and fac simile, except as to their numbers, and were in words and figures as follows, viz:

No. 43. United States of America. $500.

Dated July 1st, 1875.

COUNTY OF CUMING, *State of Nebraska:*

(West Point Precinct Bond.)

Know all men by these presents, that the West Point Precinct, in

county of Cuming and State of Nebraska, acknowledges itself indebted to the bearer hereof in the sum of five hundred dollars for value received, which said sum the said West Point Precinct promise and agree to pay to the bearer hereof, at the National Park Bank, in the city of New York, on the first day of July, anno Domini 1895, and also interest thereon at the rate of ten per cent. per annum semi-annually, on the first days of January and July in each and every year ensuing the date hereof, on presentation of the annexed coupons or interest warrants as they severally fall due, at the National Park Bank, in the city of New York, in lawful money of the United States.

3 This bond is one of a series of sixty bonds of five hundred dollars each, amounting in the aggregate to thirty thousand dollars, issued by the West Point Precinct of Cuming county, and State of Nebraska, as authorized by a vote of its legal voters and in accordance with chapter 35 Revised General Statutes, approved February 15th, 1869, and (an) act setting aside the revenue arising from the taxation of works of internal improvements to pay the bonds issued to construct or complete the same.

These bonds are issued to aid the West Point Manufacturing Company in improving the water power of the Elkhorn river for the purpose of propelling public grist mills, and other works of internal improvement of a public nature, in said West Point Precinct, to secure the payment of the principal and interest of said bonds, the annual revenue and all the taxable property of said West Point Precinct is pledged.

In testimony whereof, the board of county commissioners of Cuming county, State of Nebraska, have caused this bond to be signed on behalf of West Point Precinct, in the county of Cuming, and State of Nebraska, by its chairman, attested by its clerk, who has affixed thereto the seal of the said county at the clerk's office in West Point, in the said county, this first day of July, A. D. 1875.

C. L. SIECKE, *Chairman.*

THOMAS ROEH, *Clerk.*

(Cuming county seal, Nebraska.)

II. Plaintiff further avers that on the first day of January, A. D. 1876, he became the purchaser of said sixteen coupons or interest warrants, and each and every of them in good faith, and for a valuable consideration, before the same became due and payable.

4 III. Plaintiff further avers that the only work of internal improvement of a public nature for which the said bonds were so issued to the said West Point Manufacturing Company as aforesaid, were the improvement of the water power of the said Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct in said county of Cuming.

That the improving of the said water power of the said river for the purposes last aforesaid, would and did render the water power of said river available and useful for propelling other works of in-

ternal improvement of a public nature, which were or thereafter might be constructed and located upon the said river in said precinct; but this plaintiff avers that he had at the time of the sale and delivery of the said bond to him as aforesaid no notice or knowledge of any other works of internal improvement of a public nature in aid of which the said bonds were so issued, except the said works specially mentioned and described in said bonds, viz: The improvement of the water power of the Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct in said county of Cuming.

IV. Plaintiff further avers that when said coupons became due and payable they were duly presented for payment, but payment was refused, nor has the said defendant ever paid any part thereof, although often requested to pay the same, nor has West Point Precinct ever paid the same or any part thereof.

That by reason of the premises aforesaid on, to wit, the first day of July, A. D. 1877, at the district aforesaid, the said defendant then and there became liable to pay said plaintiff the said sum of money in said sixteen coupons specified according to the tenor and effect thereof, and being so liable the said defendant, in consideration thereof, then and there promised to pay said plaintiff said several sums of money in said sixteen interest coupons mentioned, and each and every of them according to the tenor and effect thereof, when said defendant should be afterwards requested to pay the same.

V. There is due the plaintiff from the said defendant on said sixteen coupons the sum of $400 with ten per cent. interest thereon from July first, A. D. 1877.

Second cause of action:

I. That heretofore, to wit, on the first day of September, A. D. 1875, at the district aforesaid, the defendant, the County of Cuming, made, executed, and delivered its certain forty-three instruments in writing, commonly called coupons or interest warrants, numbered respectively as follows: Numbers 1, 2, 3, 4, 5, 6, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, and 59, each for the sum of twenty-five dollars, and payable to the bearer on the first day of January, A. D. 1878, at the National Park Bank, in the city of New York, each and every of said coupons or interest warrants being signed by Thomas Roeh, clerk of the said county of Cuming, and are *fac similes* of each other, except as to their numbers, and represent and were for the semi-annual interest due on forty-three certain bonds bearing even numbers with said coupons, dated the first day of July, A. D. 1875, and which said coupons are of the same tenor and effect, and were, except as to the numbers, in words and figures following, viz: $25.00.

The West Point Precinct, Cuming County, State of Nebraska,

will pay the bearer twenty-five dollars at the National Park Bank, in the city of New York, on the first day of January, A. D. 1878.

THOMAS ROEH, *Clerk.*

6 No. 1. And the said plaintiff avers that the said bonds, and each and every of them, from which said forty-three coupons were detached, are special bonds of the said County of Cuming, issued by its board of county commissioners in behalf of West Point Precinct, a voting district within and a part of the said County of Cuming, in accordance with the provisions of chapter thirty-five, general statutes of Nebraska, and were alike and *fac similes*, except as to their numbers, and were in words and figures the same as the copy of the said bond set forth in the first cause of action in this petition.

2. Plaintiff further avers that on, to wit, on said first day of January, A. D. 1876, he became the purchaser of said forty-three coupons or interest warrants, and each and every of them in good faith, and for a valuable consideration, before the same became due and payable.

3. Plaintiff further avers that the only work of internal improvement of a public nature for which the said bonds were so issued to the said West Point Manufacturing Company, as aforesaid, were the improvement of the water power of the said Elkhorn River for the purpose of propelling public grist mills in said West Point Precinct in said County of Cuming.

That the improving of the said water power of the said river, for the purposes last aforesaid, would and did render the water power of said river available and useful for propelling other works of internal improvement of a public nature which were or thereafter might be constructed and located upon the said river in said precinct; but this plaintiff avers that he had at the time of the sale and delivery of the said bond to him as aforesaid no notice or knowledge of any other works of internal improvement of a public nature in aid of which the said bonds were so issued except the

7 said works specially mentioned and described in said bonds, viz: The improvement of the water power of the Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct, in said County of Cuming.

4. Plaintiff further avers that when said coupons became due and payable they were duly presented for payment, but payment was refused, nor has the said defendant ever paid any part thereof, although often requested to pay the same, nor has West Point Precinct ever paid the same or any part thereof. That by reason of the premises aforesaid on, to wit, the first day of January, A. D. 1878, at the district aforesaid, the said defendant then and there became liable to pay said plaintiff the said sum of money in said forty-three coupons specified according to the tenor and effect thereof, and being so liable the said defendant, in consideration thereof, then and there promised to pay said plaintiff said several sums of money in

said forty-three interest coupons mentioned, and each and every of them, according to the tenor and effect, when said defendant should be afterwards requested.

.5 There is due the plaintiff from the said defendant on said forty-three coupons the sum of $1,075, with ten per cent. interest thereon from January 1st, A. D. 1878.

Third cause of action:

I. That heretofore, to wit, on the first day of September, A. D. 1875, at the district aforesaid, the defendant, the County of Cuming, made, executed, and delivered its certain forty-three instruments in writing commonly called coupons or interest warrants, numbered, respectively, as follows: Numbers 1, 2, 3, 4, 6, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29. 30, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58 and 59, each for the sum of twenty-five dollars, and payable to the bearer on the first day of July, A. D. 1878, at the National Park Bank, in
8 the city of New York, each and every of said coupons or interest warrants being signed by Thomas Roeh, clerk of the said County of Cuming, and are *fac similes* of each other except as to their numbers, and represent, and were for the semi-annual interest due on forty-three certain bonds bearing even numbers with said coupons, dated the first day of July, A. D. 1875, and which said coupons are of the same tenor and effect, and were, except as to their numbers, in words and figures following, viz:

$25.00. $25.00.

The West Point Precinct Cuming County, State of Nebraska, will pay the bearer twenty-five dollars at the National Park Bank, in the city of New York, on the first day of July, A. D. 1878.

THOMAS ROEH, *Clerk.*

No. 1. And said plaintiff avers that the said bonds, and each and every of them, from which said forty-three coupons were detached, are special bonds of the said County of Cuming, issued by its board of county commissioners in behalf of West Point Precinct, a voting district within and in part of the said County of Cuming, in accordance with the provisions of chapter thirty-five, general statutes of Nebraska, and were alike and *fac similes* except as to their numbers, and were in words and figures the same as the copy of the said bond set forth in the first cause of action in this petition.

2. Plaintiff further avers that on, to wit, on the said first day of January, A. D. 1876, he became the purchaser of said forty-three coupons or interest warrants, and each and every of them, in good faith, and for a valuable consideration, before the same became due and payable.

3. Plaintiff further avers that the only work of internal improvement of a public nature for which the said bonds were
9 so issued to the said West Point Manufacturing Company as

aforesaid, were the improvement of the water power of the said Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct, in said County of Cuming. That the improving of the said water power of the said river for the purposes last aforesaid would and did render the water power of said river available and useful for propelling other works of internal improvement of a public nature, which were or thereafter might be constructed and located upon the said river in said precinct; but this plaintiff avers that he had at the time of the sale and delivery of the said bond to him as aforesaid, no notice or knowledge of any other works of internal improvement of a public nature in aid of which the said bonds were so issued, except the said works specially mentioned and described in said bonds, viz, the improvement of the water power of the Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct, in said County of Cuming.

4. Plaintiff further avers that when said coupons became due and payable they were duly presented for *for* payment, but payment was refused, nor has the said defendant ever paid any part thereof, although often requested to pay the same; nor has West Point Precinct ever paid the same, or any part thereof. That, by reason of the premises aforesaid, on, to wit, the first day of July, A. D. 1878, at the district aforesaid, the said defendant then and there became liable to pay said plaintiff the said sum of money, in said forty-three coupons specified, according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, then and there promised to pay said plaintiff said several sums of money in said forty-three interest coupons mentioned, and each and every of them, according to the tenor and effect, when said defendant should be afterwards requested.

5. There is due the plaintiff from the said defendant on said forty-three coupons the sum of $1,075.00, with ten per cent. interest thereon from July first, A. D. 1878.

Fourth Cause of Action.

That heretofore, to wit, on the first day of September, A. D. 1875, at the district aforesaid, the defendant, the County of Cuming, made, executed, and delivered its certain forty-three instruments in writing, commonly called coupons or interest warrants, numbered, respectively, as follows: Numbers 1, 2, 3, 4, 6, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, and 59, each for the sum of twenty-five dollars, and payable to the bearer on the first day of January, A. D. 1879, at the National Park Bank, in the city of New York, each and every of said coupons or interest warrants being signed by Thomas Roch, clerk of the said County of Cuming, and are *fac similes* of each other, except as to their numbers, and represent, and were for the semi-annual interest due on forty-

three certain bonds bearing even numbers with said coupons, dated the first day of July, A. D. 1875, and which said coupons are of the same tenor and effect, and were, except as to the numbers, in words and figures following, viz:

$25.00 $25.00.

The West Point Precinct, Cuming County, State of Nebraska, will pay the bearer twenty-five dollars, at the National Park Bank, in the city of New York, on the first day of January, A. D. 1879.

THOMAS ROEH, *Clerk.*

I. And said plaintiff avers that the said bonds, and each and every of them, from which said forty-three coupons were detached,
11 are special bonds of the said County of Cuming issued by its board of county commissioners in behalf of West Point Precinct, a voting district within and a part of the said County of Cuming, in accordance with the provisions of chapter thirty-five, general statutes of Nebraska, and were alike and fac similes, except as to their numbers, and were in words and figures the same as the copy of the said bond set forth in the first cause of action in this petition.

II. Plaintiff further avers that on, to wit, on said first day of January, A. D. 1876, he became the purchaser of said forty-three coupons or interest warrants, and each and every of them, in good faith, and for a valuable consideration, before the same became due and payable.

III. Plaintiff further [avers] that the only work of internal improvement of a public nature for which the said bonds were so issued to the said West Point Manufacturing Company as aforesaid, were the improvement of the water power of the Elkhorn river, for the purpose of propelling public grist mills in said West Point Precinct in said County of Cuming.

That the improving of the said water power of the said river for the purposes last aforesaid, would and did render the water power of the said river available and useful for propelling other works of internal improvement of a public nature which were or thereafter might be constructed and located upon the said river in said precinct; but this plaintiff avers that he had at the time of the sale and delivery of the said bond to him as aforesaid, no notice or knowledge of any other works of internal improvement of a public nature, in aid of which the said bonds were so issued, except the said works specially mentioned and described in said
12 bonds, viz: the improvement of the water power of the Elkhorn river, for the purpose of propelling public grist mills in said West Point Precinct in said County of Cuming.

IV. Plaintiff further avers that when said coupons became due and payable they were duly presented for payment, but payment was refused, nor has the said defendant ever paid any part thereof,

although often requested to pay the same, nor has West Point precinct ever paid the same or any part thereof.

That by reason of the premises aforesaid, on to wit, the first day of January, A. D. 1879, at the district aforesaid, the said defendant then and there became liable to pay said plaintiff the said sum of money in said forty-three coupons specified according to the tenor and effect thereof, and being so liable the said defendant, in consideration thereof, then and there promised to pay said plaintiff said several sums of money in said forty-three interest coupons mentioned, and each and every of them according to the tenor and effect when said defendant should be afterward requested.

V. There is due the plaintiff from the said defendant on said forty-three coupons the sum of $1,075, with ten per cent. interest thereon from January first, A. D. 1879.

Fifth cause of action:

That heretofore, to wit, an the first day of September, A. D. 1875, at the district aforesaid, the defendant, the County of Cuming, made, executed, and delivered its certain forty-three instruments in writing commonly called coupons or interest warrants, numbered, respectively, as follows: Numbers 1, 2, 3, 4, 6, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58 and 59, each for the sum of twenty-five dollars, and payable to the bearer on the first day of July, A. D. 1879, at the National Park Bank, in the city of New York each and every of said coupons or interest warrants being
13 signed by Thomas Roeh, clerk of the said County of Cuming, and are *fac similes* of each other except as to their numbers, and represent, and were for the semi-annual interest due on forty-three certain bonds bearing even numbers with said coupons dated the first day of July, A. D. 1875, and which said coupons are of the same tenor and effect and were, except as to the numbers, in words and figures following, viz:

$25.00. $25.00.

The West Point Precinct, Cuming County, State of Nebraska, will pay the bearer twenty-five dollars at the National Park Bank, in the city of New York, on the first day of July, A. D. 1879.

THOMAS ROEH, *Clerk.*

I. And plaintiff avers that the said bonds, and each and every of them, from which said forty-three coupons were detached, are special bonds of the said County of Cuming, issued by its board of county commissioners in behalf of West Point Precinct, a voting district within and a part of the said County of Cuming, in accordance with the provisions of chapter thirty-five, general statutes of Nebraska, and were alike and *fac similes*, except as to their numbers, and were in words and figures the same as the copy of said bond set forth in the first cause of action in this petition.

II. Plaintiff further avers that on, to wit, on said first day of January, A. D. 1876, he became the purchaser of said forty-three coupons, or interest warrants, and each and every of them in good faith and for a valuable consideration before the same became due and payable.

III. Plaintiff further avers that the only work of internal improvement of public nature for which the said bonds were so issued to the said West Point Manufacturing Company as aforesaid,
14 were the improvement of the water power of the said Elkhorn river, for the purpose of propelling public grist mills in said West Point Precinct, in said County of Cuming.

That the improving of the said water power of the said river for the purposes last aforesaid would and did render the water power of said river available and useful for propelling other works of internal improvement of a public nature which were or thereafter might be constructed and located upon said river in said precinct: but this plaintiff avers that he had at the time of the sale and delivery of the said bond to him as aforesaid no notice or knowledge of any other works of internal improvement of a public nature, in aid of which the said bonds were so issued, except the said work specially mentioned and described in said bonds, viz: the improvement of the water power of the Elkhorn river for the purpose of propelling public grist mills in said West Point Precinct in said County of Cuming.

4. Plaintiff further avers that when said coupons became due and payable they were duly presented for payment, but payment was refused, nor has the said defendant ever paid any part thereof, although often requested to pay the same, nor has West Point Precinct ever paid the same or any part thereof; that by reason of the premises aforesaid on, to wit, the first day of July, A. D. 1879, at the district aforesaid, the said defendant then and there became liable to pay said plaintiff the said sum of money in said forty-three coupons specified according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, then and there promised to pay said plaintiff said several sums of money in said forty-three interest coupons mentioned, and each and
15 every of them, according to the tenor and effect, when said defendant should be afterward requested.

5. There is due the plaintiff from the said defendant on said forty-three coupons the sum of $1,075.00, with ten per cent. interest thereon from July first, A. D. 1879.

6. Plaintiff further avers that the bonds aforesaid, with the interest coupons thereto attached, and each and every of them, were at the date aforesaid issued and negotiated by said defendant under and by virtue of a majority vote of the qualified voters of West Point precinct, a local sub-division of said Cuming County, and in pursuance of an act of the Legislature of the State of Nebraska, (being chapter thirty-five, general statutes of Nebraska,) approved February 15th, 1869, entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or issue bonds to

aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose."

7. Plaintiff further avers that the improvement of the water power of the Elkhorn river, to aid which said bonds were issued and negotiated, consisted in constructing a canal for water-power purposes in said West Point Precinct.

Wherefore plaintiff prays judgment against the defendant for the sum of $4,700.00, with interest at the rate of ten per cent. per annum on $400.00 from July 1st, 1877: and on $1,075.00 from January 1st, 1878; and on $1,075.00 from July 1st, 1878; and on $1,075.00 from January 1st, 1879; and on $1,075.00 from July 1st, 1879, and costs of suit.

JOHN I. BLAIR,
By E. C. & W. C. LARNED AND
J. C. CRAWFORD, *his Attorney.*

STATE OF NEBRASKA, }
Cuming County, } *ss:*

J. C. Crawford, being duly sworn, says he is one of the attorneys for plaintiff herein, duly authorized in the premises; that the above action is founded upon written instruments for the payment of money only, and now in the possession of affiant for collection; that he has read the foregoing petition of John I. Blair, and knows the contents thereof, and that the facts therein stated are, as he verily believes, true.

J. C. CRAWFORD.

Subscribed and sworn to before me, this 12th day of March, A. D. 1881.

JNO. B. BARNES,
Judge of the 6th Judicial District of the State of Nebraska.

Said petition is endorsed as follows: No. 92 G. In circuit court of the United States for the district of Nebr., Jno. I. Blair *vs.* The County of Cuming. Petition. Filed M'ch 18, 1881. Watson B. Smith, clerk. E. C. and W. C. Larned and J. C. Crawford, plff's att'ys.

Thereupon, afterwards, to wit, on the 23d day of April, 1881, a demurrer was filed in said case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN I. BLAIR, Plaintiff,
vs.
THE COUNTY OF CUMING, Defendant, } Demurrer.

And now comes the said defendant, The County of Cuming, and

demurs to the petition of the said plaintiff, and states the following cause of demurrer thereto, to wit:

That the said petition of said plaintiff does not state facts
17 sufficient to constitute a cause of action against this defendant and in favor of the said plaintiff.

Wherefore the said defendant, for the cause aforesaid, asks if the said plaintiff shall be permitted to have or maintain his said action thereof against this defendant.

URIAH BRUNER AND
R. F. STEVENSON,
Attorneys for Defendant.

Said demurrer is endorsed as follows:

No. 92 G. In circuit court of the United States for the district of Nebraska. John I. Blair *vs.* The County of Cuming. Demurrer. Filed April 23, 1881. Watson B. Smith, clerk. Uriah Bruner and R. F. Stevenson, att'ys for def'ts.

Thereupon afterwards, at the May term of said court, to wit, on the 3rd day of June, 1881, the following proceedings were had in said case, as appears of record on folio 145, Journal G, of said court.

JOHN I. BLAIR
vs.
CUMING COUNTY. } No. 92, G.

This cause being heard on demurrer to the petition, the court does, on consideration, sustain the same; to which ruling of the court pl'ff excepts. And the plaintiff refusing to amend his petition, it is therefore ordered and adjudged by the court that plaintiff's action be dismissed, and that the defendant recover of the plaintiff its costs taxed at $50 $\frac{40}{100}$, to which judgment plaintiff excepts.

Thereupon afterwards, to wit, on the 21st day of July, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

18 Know all men by these presents that we, J. W. Pollock and F. W. Ragoss, are held and firmly bound unto the County of Cuming in the full and just sum of two hundred and fifty dollars, to be paid to the said the County of Cuming, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 21st day of July, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between John I. Blair, plaintiff, and the County of Cuming, defendant, judgment was rendered against the said John I. Blair, and the said John I. Blair, plaintiff, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judg-

ment in the aforesaid suit, and a citation directed to the said the County of Cuming, defendant, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next.

Now, the condition of the above obligation is such, that if the said John I. Blair, plaintiff, shall prosecute said writ of error to effect, and answer all damages and costs, if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. W. POLLOCK.
F. W. RAGOSS.

Approved by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 92. G. United States circuit court, district of Nebraska. John I. Blair *vs.* The County of Cuming. Bond. Filed July 21, 1881. Watson B. Smith, clerk.

19 Thereupon afterwards, to wit, on the 21st day of July, 1881, a writ of error was allowed and citation issued, of which the following are the originals.

20 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John I. Blair, plaintiff, and The County of Cuming, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 21st day of July, 1881.

WATSON B. SMITH, *Clerk.*

Allowed by—
ELMER L. DUNDY.

[Endorsed:] No. 92. G. United States circuit court, district of Nebraska. John I. Blair *vs.* The County of Cuming. Writ of error.

21 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To the County of Cuming, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerks office of the circuit court of the United States for the district of Nebraska, wherein John I. Blair, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 21st day of July, 1881.

The circuit judge is absent from State and district.

ELMER L. DUNDY, *Judge.*

22 I hereby accept service of the within citation.
August 16th, 1881.

URIAH BRUNER,
Of Counsel for Defendant.

[Endorsed:] No. 92. G. United States circuit court, district of Nebraska. John I. Blair *vs.* The County of Cuming. Citation. Filed August 17th, 1880. Watson B. Smith, clerk.

23 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to twenty-one, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk in the case of John I. Blair, plaintiff, *vs.* The County of Cuming, defendant, and that a copy of the writ of error and citation have been lodged and the same remain on file in my said office.

Witness my hand and the seal of said court, at Omaha, this 17th day of August, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

[Endorsed:] Supreme Court of the United States. John I. Blair,

appellant, *vs.* The County of Cuming, appellee. E. C. and W. C. Larned, sol'rs for appellant. J. C. Crawford, of counsel.

[Endorsed on cover:] Nebraska C. C. U. S. No. 306. John I. Blair, plaintiff in error, *vs.* The County of Cuming. Filed 24 September, 1881.

111-363

SUPREME COURT U.S.
FILED
MAR 27 1884
[illegible], Clerk.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

JOHN I. BLAIR,

Plaintiff in Error,

vs.

THE COUNTY OF CUMING,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER C. LARNED,

ATT'Y FOR PLAINTIFF IN ERROR.

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

JOHN I. BLAIR,
Plaintiff in Error,

vs.

THE COUNTY OF CUMING,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The petition in this case (page 1 of the abstract) sets forth a liability of the county of Cuming, of the State of Nebraska, upon certain coupons or interest warrants, attached to bonds, forty-three in number, which were issued on behalf of the West Point precinct, in the county of Cuming, and signed by the chairman, and attested by the clerk of the county, under the county seal.

The first cause of action is for over-due coupons, amounting to four hundred dollars, with ten per cent. interest from July 1, 1877, each subsequent cause of action in the petition setting forth the amount due upon the

respective interest warrants as they became due and were not paid, together with interest thereupon after their maturity.

The total amount of over-due coupons is stated (page 10 of the abstract) to be $4,700 principal, together with a large amount of interest upon the over-due coupons, which amounted at the time of the filing of the petition to seventeen hundred and forty-five dollars and sixty-three cents ($1,745.63), making the total amount for which judgment was asked in the court below, six thousand four hundred and forty-five dollars and sixty-three cents ($6,445.63).

The petition alleges (page 1 of the abstract), that the bonds were the special bonds of the said county of Cuming, issued by its board of county commissioners in behalf of West Point precinct, a voting district within, and a part of said county of Cuming, in accordance with the general provisions of chapter 45, general statutes of Nebraska.

A copy of the bond is given (pages 1 and 2 of the abstract), which shows that the bonds had upon their face the following statement:

"This bond is one of a series of sixty bonds of five "hundred dollars each, amounting in the aggregate to "thirty thousand dollars, issued by the West Point pre-"cinct of Cuming county and State of Nebraska, as au-"thorized by a vote of its legal voters and in accordance "with chapter 35 Revised General Statutes, approved "February 15, 1869, and (an) act setting aside the rev-"enue arising from the taxation of works of internal im-"provements to pay the bonds issued to construct or "complete the same.

"These bonds are issued to aid the West Point Manu-
"facturing Company in improving the water power of the
"Elkhorn river for the purpose of propelling public grist
"mills, and other works of internal improvement of a pub-
"lic nature, in said West Point precinct, to secure the
"payment of the principal and interest of said bonds, the
"annual revenue, and all taxable property of said West
"Point precinct is pledged."

It is alleged (page 2 of the abstract) that the plaintiff was the purchaser of the coupons or interest warrants in good faith for a valuable consideration before due. The same allegation is made as to all the other coupons mentioned in the subsequent causes of action contained in the petition.

The purpose for which the bonds were issued is stated in the petition (page 2 of the abstract), and is repeated in each of the causes of action subsequently set forth in the petition. It is as follows:

"Plaintiff further avers that the only work of internal
"improvement of a public nature for which the said bonds
"were so issued to the said West Point Manufacturing
"Company as aforesaid, was the improvement of the water
"power of the said Elkhorn river for the purpose of
"propelling public grist mills in said West Point precinct,
"in said county of Cuming.

"That the improving of the said water power of the said
"river for the purposes last aforesaid, would and did render
"the water power of said river available for propelling
"other works of internal improvement of a public nature,
"which were or thereafter might be constructed and
"located upon the said river in said precinct: but this plain-
"tiff avers that he had at the time of the sale and delivery
"of the said bond to him as aforesaid, no notice or knowl-

"edge of any other works of internal improvement of a "public nature in aid of which the said bonds were so "issued, except the said works specially mentioned and "described in said bonds, viz: The improvement of the "water power of the Elkhorn river, for the purpose of "propelling public grist mills in said West Point precinct, "in said county of Cuming."

"It is further alleged (page 3 of the abstract), that the "coupons were duly presented for payment but had never "been paid or any part thereof."

These statements of fact must all be taken as admitted by the demurrer filed to the petition or complaint, which appears on pages 10 and 11 of the abstract. The only cause of demurrer stated is the general one, "that "the said petition of said plaintiff does not state facts "sufficient to constitute a cause of action against this "defendant and in favor of the said plaintiff."

The cause coming on to be heard below upon the demurrer, the demurrer is sustained, and the plaintiff excepts to the ruling of the court in sustaining it. The plaintiff refusing to amend his petition judgment was given that the plaintiff's action be dismissed and defendant recover of the plaintiff its costs, to which judgment plaintiff took exception. A writ of error was taken out and citation issued, bond filed and the case brought to this court.

I.

The admitted facts, then, are that these bonds and interest coupons thereto attached were issued by the board of commissioners of Cuming county on behalf of West Point precinct, in accordance with the provisions of chap-

ter 35, of the General Statutes of Nebraska, and that the plaintiff was a *bona fide* purchaser and holder of the same in good faith before due. That bonds of the nature of those involved in this suit are commercial and negotiable instruments appears from the cases of *Mercer County* v. *Hackett*, 1 Wall., 83, and *White* v. *Railroad Company*, 21 How., 577.

Being, therefore, commercial instruments, negotiable when in the hands of *bona fide* purchasers they come within the rules of the law merchant, which protect such holders, and where the bonds purport upon their face to be issued in pursuance of and compliance with a certain statute, such *bona fide* purchaser is not bound to look beyond the face of the bond.

See

Comrs. of Knox Co. v. *Aspinwall*, 21 How., 545.

Mercer Co. v. *Hackett*, 1 Wall., 83.

Grand Chute v. *Winnegar*, 15 Wall., 356.

II.

Such being the law as to the rights of *bona fide* holders of such securities as these, it follows that the only question which can be discussed upon this record is whether there was power to issue the bonds in question.

The bond itself contains upon its face a statement that it is issued under the law above quoted, "to aid the "West Point Manufacturing Company in improving "the water power of the Elkhorn river for the pur- "pose of propelling public grist mills and other works "of internal improvment of a public nature in said West

"Point precinct," and hence the only question properly to be considered is whether there was power under that law in the precinct of West Point to vote these bonds, and in the county to issue them in accordance with the provisions of the act, for the purpose stated in the bond; that is, for the improvement of the water power of the Elkhorn river to run grist mills and other works of internal improvement of a public nature.

The only purpose mentioned, for which the improved water power was to be used, is to propel public grist mills. If there were any other improvements to be helped by the general improvement of the water power, they are not specifically stated but are declared to be of a public nature; that is, the declaration is made upon the face of the bond that such other improvements, if any, were of a character contemplated by the act under which the bond is issued. But, as has been seen, it was further stated in the petition and admitted by the demurrer that the plaintiff knew nothing and had no notice of any thing for which the improved water power was to be used, except to propel public grist mills. Plainly, therefore, the first question to be determined in the case is whether a public grist mill, run by water, is a work of internal improvement within the meaning of the Nebraska statute, authorizing precincts to issue such bonds as those in question.

In considering this question it is necessary, in the first place, to discuss *Osborn* v. *County of Adams*, in 106 U. S., at page 181. In this case it was decided as follows, in the language of the opinion: "A steam grist-mill is "not, in our opinion, a work of internal improvement "within the meaning of the act of Nebraska, approved "February 15, 1869, which authorizes counties, cities and

"precincts of organized counties, to issue bonds to aid in "the construction of railroads or other works of internal "improvement."

The court says, in its opinion, which is a very short one, that there is nothing in the decisions of the courts of Nebraska holding that a steam or other grist mill is of the class of internal improvements which municipal townships in that state are empowered by the statute in question to aid by municipal bonds. This case, therefore, of *Osborn* v. *Adams Co.*, was decided by this court before the Supreme court of Nebraska had considered the statute of that state upon this subject.

Since the rendering of the opinion in *Osborn* v. *County of Adams* the Supreme court of Nebraska has thoroughly discussed the statute in question in the case of *Traver* v. *Merick County*, which is reported in the 14 Neb., at page 327. Exactly the same sections of the statute of Nebraska were under consideration in this case as were considered in *Osborn* v. *County of Adams*.

The Supreme court holds that water grist mills are works of internal improvement within the meaning of the statute in question. The language of the court, on page 333, is as follows:

"The test for determining the character of an improve- "ment of this kind is the use for which it is designed. If "it is for a public use, subject to the control and regula- "tion of the legislature, it would then seem to come "within the meaning of the words internal improvement."

The court also considers the point raised, that the word "railroad," being in that section of the act which refers to the issuing of bonds by *counties* and *cities*, excluded any other kind of internal improvements from the scope of

the act, except such as are cognate to railroads, and after such consideration, refuses so to construe the statute. The language of the court, on page 334, is:

"Besides, the language of the statute will not admit of "the construction contended for, without adding thereto "the word 'like,' or a word of similar import. No court "would be justified in thus importing a word into a stat- "ute when its meaning was plain and unambiguous, and "we must hold that there is no such restriction in the act "above referred to. The mill in this case is said to be "propelled by water drawn from the Platte river, and is "for the use of all who may desire to patronize it, at such "rates of toll as may be prescribed by the county com- "missioners of Merrick county.

"And in our opinion, it is a work of internal improve- "ment within the meaning of the act."

In the opinion in *Frazer* v. *Merick County* the court discusses very fully the provisions of the Nebraska statute which relate to mills and mill dams, and particularly those provisions which give to parties desiring to build mills and mill dams the right of eminent domain, and those other provisions, being sections 27, 28 and 29, quoted on page 332 of the opinion, which declare all mills for the grinding of grain for toll in the state to be public mills, and require the owner or occupier of every public mill to grind such grain as shall be brought to him, and at such rates as shall be fixed and determined by the commissioners of each county.

It will be observed that in the case at bar it is expressly stated upon the face of the bond (page 2 of the abstract), that the mills to aid which the bonds in question were issued are public grist mills. And that such was the fact

is of course admitted by the demurrer, since the public nature of the grist mill is alleged in the declaration as well as stated in the bond. The mills, therefore, mentioned in this bond, are strictly within the provisions of the section above referred to which define and limit the powers and duties of the owners of such mills.

This court has said, in *Munn* v. *Illinois*, 94 U. S., at page 126: "Property does become clothed with a public "interest when used in a manner to make it of public con- "sequence and affect the community at large." And in this same case the court rests the right of the legislature, or other governing power, to regulate private property, upon the principle that "when private property is de- "voted to a public use it is subject to a public regulation."

It is also to be noted in the case at bar that the power of eminent domain is given for purpose of furthering the erection of mills of this character, whereas no such power was given to those building warehouses, which were under discussion in the case of *Munn* v. *Illinois*, above referred to.

The public nature of a water grist mill in Nebraska would seem, therefore, to be sufficiently established by the provisions of the Nebraska statute above referred to, the decision of the Nebraska Supreme court in *Traver* v. *Merick Co.*, *supra*, and the language and reasoning of this court in the case of *Munn* v. *Illinois*.

Now, the section of the act which authorizes precincts to issue such bonds as those in question in this case does not mention the word railroads, but says the precincts shall have the privilege of voting to aid works of internal improvement. Why is not a public grist mill in which the community at large is interested, which is obliged by

law and at rates prescribed by law, to grind the grain for that community, and upon which the welfare of an agricultural population is very largely dependent, a work of internal improvement?

This court has held that where the provisions of a state statute are under consideration, the court will follow the construction of such statute given by the state court.

See:

Township of Elmwood v. *Marcy*, 92 U. S., 289; also

Town of South Ottawa v. *Perkins*, 94 U. S., 261, and

Peck v. *C. & N. W. Ry. Co.*, 94 U. S., 164.

It is to be noted that at the time of the rendering of judgment in the case at bar, in the court below, the Supreme court of Nebraska had not passed upon the statute in question, and in the case of *Osborn* v. *The County of Adams*, this court expressly states that it gives its decision in the absence of any judicial construction of the statute in question by the court of Nebraska.

It is the doctrine of this court, that even where it has rendered an opinion, construing the state statute in accordance with the decisions of the state court upon that statute, yet, if the state courts adopt a different construction of the statute, this court will follow the construction finally adopted by the state court. Much more would this be the case, where at the time of the rendering of the first opinion in this court, there was no decision of the state court, either one way or the other, on the questions involved.

The doctrine that this court will follow the final decis-

ion of the Supreme court of the state, even where it had previously rendered a contrary opinion, is laid down in *Green* v. *Neal's Lessee*, 6 Peters, 291, in which case the whole question is elaborately discussed. The same principle also governs this court in the case of *Geckie* v. *Kirby Carpenter Co.*, 106 U. S., 379: in which case the court follows the opinion of the Wisconsin Supreme court in the case of *Milledge* v. *Colman*, 47 Wis., 184, which was a case decided about four months after the decision of the United States court below. This court reverses the opinion of the lower court in that case, because it was inconsistent with *Milledge* v. *Colman*, though that decision was not rendered until after the Federal court had passed upon the case. The same rule is announced in *Suydam* v. *Williamson*, 24 How., 427, and in *Arguello* v. *United States*, 18 How., 539.

We would, therefore, respectfully suggest that the opinion of the Supreme court of Nebraska, in *Trazer* v. *Merrick Co.*, which thoroughly discusses the statute in question, and decides that a public grist mill is included in the term, "works of internal improvement," used in that statute, should govern the decision of this court upon the statute in question, and entitles the plaintiff in error to a reversal of the judgment of the court below.

On the point that a public grist mill, like the one in this case, is a work of internal improvement, see also:

Leavenworth Township v. *Miller*, 7 Kans., 527.

Boston v. *R. M. Co., &c.*, 23 Am. Decs., 626 (12 Pick., 497).

Scuder v. *Trenton & Delaware Falls Co.*, 23 Am. Decs., 756 (1 Saxton Ch., N. J., 694.)

Beckman v. *R. R. Co.*, 22 Am. Decs., 679 (3 Paige Ch., 45.)

Also:

Burlington v. *Beasly*, 94 U. S., 310.

III.

This suit is properly brought against the county. This is expressly decided in *Davenport* v. *County of Dodge*, 105 U. S., 237, which was a case arising upon precinct bonds issued under the same act as those in question in this case. The court say, upon page 241:

"Precincts are governed by the county commissioners, "the governing board of the county, and by the appro- "priate officers of the state. Their relation to a county "is like that of a ward to a city. Having no corporate "existence, no separate municipal authority, they cannot, "says again the Supreme court of the state in the "case last cited, 'enter into contracts directly or "indirectly, nor assume obligations which a court "might be called on to enforce.' Hence, the precinct "cannot become the obligor of precinct bonds, and we "think it follows that the county, which does have a cor- "porate existence, and can contract and be contracted "with, and upon whose officers is imposed the duty not "only of issuing the bonds, but of providing for the pay- "ment of them, is the political entity bound by the obliga- "tion and charged with the debt created thereby. The "only difference between the two kinds of debt is, that "in one all the taxable property of the county is charged "with its payment, and in the other only a part. * * "* * We think, therefore, that the special bonds which

"the county commissioners are to issue for the precincts "are, in legal effect, the special bonds of the county, pay- "able out of a special fund to be raised in a special way."

The plaintiff below, who is also the plaintiff in error here, brought two suits in the United States court at Omaha, one against the precinct and one against the county, both of which cases are pending on appeal here, the suit against the precinct being number 310 on the docket of this court. No brief has been filed in it, nor is it intended to file any, since the decision of this court in *Davenport* v. *Dodge* decides that a precinct is not liable, and that the county is liable upon bonds of this nature.

IV.

It was also contended in the court below that inasmuch as the act requires the special nature of the bonds to be set forth therein, that the bonds are defective, because they do not specify exactly what was meant by the words "other works of internal improvement of a public "nature," which appear upon the face of the bond. The meaning of the expression in the statute that the bonds must contain a statement of their special nature, is that the bonds must show that they are precinct bonds, and that while the county is liable on them, the tax to be raised to meet them is to be derived wholly from precinct property. That this is the meaning of these words in the statute appears from *Davenport* v. *Dodge Co.*, above quoted, where the court uses the following language: "In express terms it is stated that precinct bonds shall be "the same as other bonds—that is to say, county bonds, "but must contain a statement of their special nature

"which *confines the area of the taxable property to a part* "*rather than to the whole* of the county."

This language of the statute, therefore, does not affect the question whether the other works of internal improvement of a public nature must be specified upon the face of the bonds exactly. Now it is to be noted that these bonds upon their face expressly declare that whatever other works of internal improvement besides grist mills might have been contemplated at the time of voting of the bonds, all such works were of a public nature, which is a solemn statement upon the face of the bonds that they are issued only to aid works of internal improvement which are authorized by the statute. And it appears from the admitted facts in the case (page 2 of the abstract), that the only work of internal improvement of a public nature of which the plaintiff in error had any notice or knowledge at the time when he bought and took the bonds, was the improvement of the water power of the Elkhorn river for the purpose of propelling public grist mills in said West Point precinct in said county of Cuming.

It follows, therefore, from the cases above quoted, which announce rules applicable to the commercial negotiability of instruments of the character of these bonds, that if the precinct had the power to issue them in aid of a public grist mill, the bonds must be good and valid in the hands of the plaintiff, as a *bona fide* purchaser, before maturity.

V.

No discussion will be attempted of the various technical irregularities in the form of issuing of the bonds, which were suggested by the defendant in the court below, because the doctrine as to the rights of an innocent holder of such bonds, already sufficiently alluded to, settles all these technical questions in favor of the plaintiff in error.

The only real question left to be discussed in the case is whether the precinct had the power to vote and issue the bonds for the purpose indicated. If it did they are good in the hands of an innocent holder.

It may be added that if the statute will bear the interpretation given by the Supreme court of Nebraska in *Trazer* v. *Merrick Co.*, certainly such interpretation ought to be adopted by this court in the case at bar, where the plaintiff has spent his money in good faith, and the precinct has had the benefit thereof and is now trying to avoid payment of its obligations.

WALTER C. LARNED,
Attorney for Plaintiff in Error.

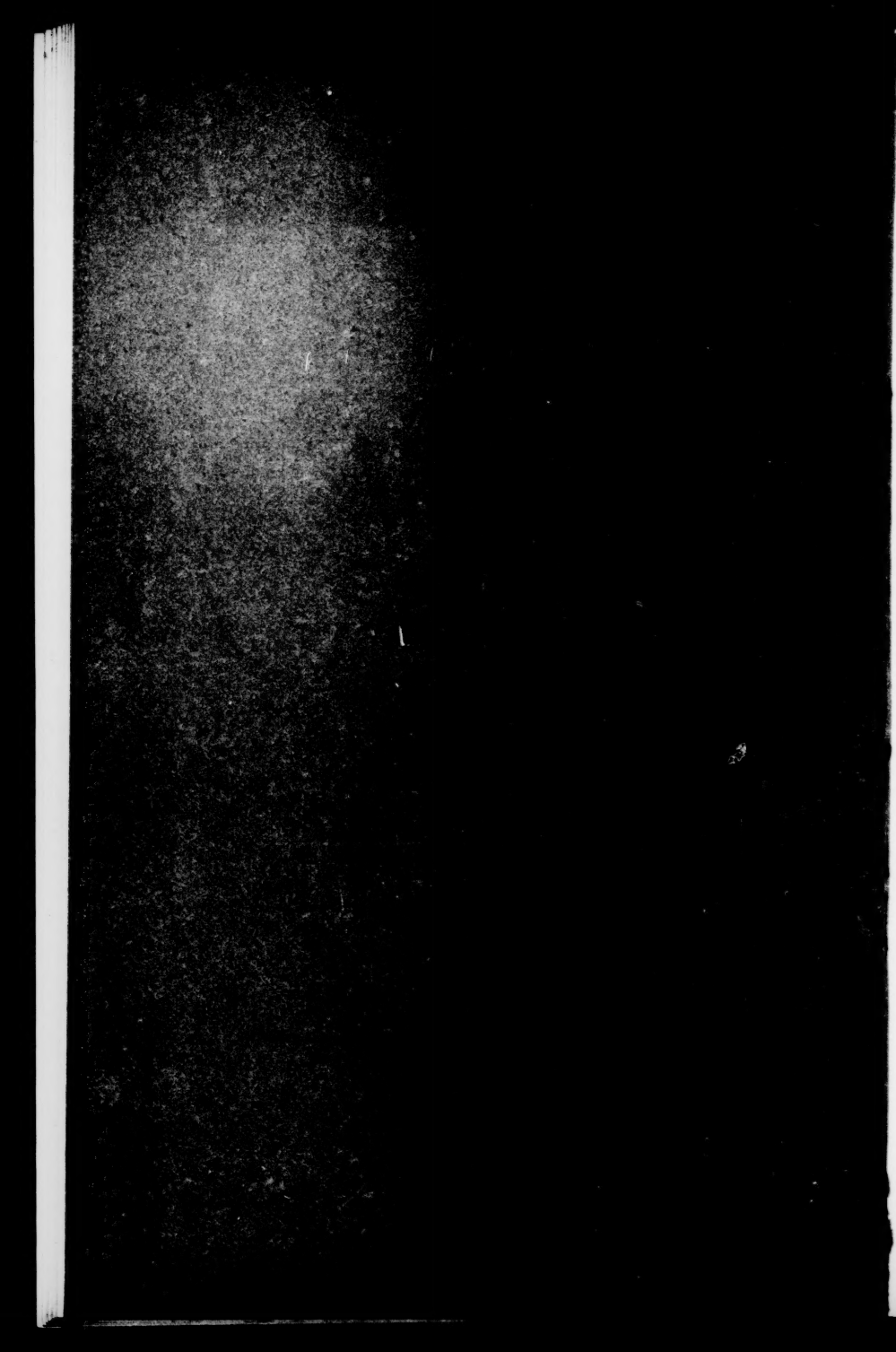
111-363

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

JOHN I. BLAIR, *Plaintiff in Error*,
vs.
THE COUNTY OF CUMING, *Defendant in Error.*
} No. 306.

URIAH BRUNER, and
R. F. STEVENSON,
Counsel for Cuming County.



In the Supreme Court of the United States.

OCTOBER TERM, 1883.

JOHN I. BLAIR, *Plaintiff in Error*,
vs.
THE COUNTY OF CUMING, *Defendant in Error*. } No. 306.

STATEMENT.

The plaintiff in error seeks to recover of Cuming county, Nebraska, the amount of certain coupons or interest warrants, detached from certain bonds, issued by West Point Precinct, within said county.

The forms of the bonds from which said coupons are alleged to have been detached, and the coupons, are as follows:

(*Bond.*)

"No.—— $500.

UNITED STATES OF AMERICA.

Dated July 1st, 1875.

COUNTY OF CUMING, STATE OF NEBRASKA.

WEST POINT PRECINCT BOND.

KNOW ALL MEN BY THESE PRESENTS, That the West Point Precinct, in the County of Cuming and State of Nebraska, acknowledges itself indebted to the bearer hereof in the sum of Five Hundred Dollars for value received, which said sum the West Point Precinct promise and agree to pay to the bearer hereof, at the National Park Bank, in the city of New York, on the first day of July, A. D. 1895, and also interest thereon at the rate of ten per cent. per annum, semi-annually, on the first days of January and July, in each and every year ensuing the date hereof, on presentation of the annexed coupons or interest warrants, as they severally fall due, at the National Park Bank, in the city of New York.

This Bond is one of a series of sixty bonds, of five hundred dollars each, amounting in the aggregate to thirty thousand dollars, issued by the West Point Precinct, of Cuming county and State of Nebraska, as authorized by a vote of its legal voters, and in accordance with chapter 35, Revised General Statutes, approved February 15th, 1869, and (an) act setting aside the revenue arising from the taxation of works of Internal Improvements to pay the bonds issued to construct or complete the same.

These bonds are issued to aid the West Point Manufacturing Company in improving the water power of the Elkhorn river, for the purpose of propelling public grist mills, and other works of Internal Improvements of a public nature in said West Point Precinct, to secure the payment of the principal and interest of said bonds, the annual revenue and all the taxable property of said West Point Precinct is pledged.

In testimony whereof, the Board of County Commissioners of Cuming County, State of Nebraska, have caused this bond to be signed on behalf of West Point Precinct, in the county of Cuming, State of Nebraska, by its chairman, attested by its clerk, who has affixed thereto the seal of the said county at the clerk's office in West Point, in the said county, this first day of July, A. D. 1875.

C. L. SIECKE, *Chairman.*

THOS. ROEH, *Clerk.*"

[Cuming county Seal, Nebraska.]

(***Coupon.***)

"$25.00. $25.00.

The West Point Precinct, Cuming county, State of Nebraska, will pay the bearer Twenty-five Dollars at the National Park Bank, in the city of New York, on the first day of ———, ——, on Bond No.——

No. —— THOMAS ROEH,
Clerk."

The bonds bear date of July 1, 1875, and are signed by C. L. Siecke, chairman of the board of county commissioners, attested by its clerk, with the seal of the county affixed thereto.

The coupons sued on are without date, and are signed by "Thomas Roeh, Clerk."

Plaintiff (record, p. 1) avers that said bonds were issued September 1, 1875, and (p. 2) that he became the *bona fide* purchaser of said coupons, January 1, 1876:

"That the *only work* of internal improvement of a public nature, for which said bonds were so issued to the West Point Manufacturing Company as aforesaid, were the improvement of the water power of said Elkhorn river, for the purpose of propelling public grist mills in said West Point Precinct."

And in the concluding part of the plaintiff's petition (paragraph 7, record, p. 10), it is further averred that said improvements in the water power "consisted in *constructing a canal* for water power purposes in said West Point Precinct." It is further averred (p. 2) "That the improving of said water power of the said river, for the purposes aforesaid, would and did render the water power of the said river available and useful for propelling other works of internal improvement of a public nature, *which were*, or thereafter might be, constructed and located upon said river, in said precinct."

To this petition the defendant in error demurred, upon the ground "That the said petition does not state facts sufficient to constitute a cause of action against this defendant, and in favor of said plaintiff." Said demurrer was sustained by the court.

ARGUMENT.

1. West Point Precinct, in the coupons, and in the bonds from which it is averred said coupons were detached, promises to pay the amount thereof to the bearer, and the said precinct is thereby made the obligor. The contract is that of West Point Precinct, and not of Cuming county. The agreement is in writing, and the agreement of the parties shall stand. Counsel know of no rules of interpretation whereby said coupons, or bonds, by the form or condition thereof, become the obligations of the

county. If said coupons, or bonds, are not the obligations of the county, this action cannot be maintained.

The Internal Improvement act referred to in the recitals of the bonds (Genl. Stats., p. 448), provides: "SEC. 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the County Commissioners of such county, or the City Council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city: *Provided*, The County Commissioners, or City Council, shall first submit the question of the issuing of such bonds, to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska [Genl. Stats., p. 235, sec. 18], for submitting to the people of a county, a question of borrowing money."

"SEC. 7. Any precinct, in any organized county of this State, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

2. Precinct bonds, according to sec. 7 of said act, shall be issued as special county bonds for the precinct *by the County Commissioners*, and such bonds shall contain a statement of the special nature of such bonds. The act does not authorize the *chairman* of the board of county commissioners and *its* clerk to issue such bonds.

The county commissioners cannot delegate their authority to issue and sign the bonds, to any one else, or to one of their number. Precinct bonds, signed by one of the county commissioners, as chairman, and attested by the clerk of the board of county commissioners, and coupons, in their *detached* state, signed by some one, as "clerk," can have no validity. A clerk of a county board cannot bind the county or precinct in absence of some law authorizing him to do so.

In Anthony *vs.* County of Jasper, 101 U. S., 693, 697, this court holds: "There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed" in order to create a legal liability. And in the recent case of Bissell *vs.* Township of Spring Valley, 3 Sup. Court Rep., 555, where "under the laws of Kansas of 1870, c. 90, authorizing the issue of township bonds, which provides that after the requisite vote in favor of the issue 'the board of county commissioners shall order the county clerk to make such subscription in the name of the township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county,' held that the signature of the clerk was essential to the validity of the bonds, even though he had no discretion to withhold it."

"The power of the board of county commissioners to bind the township is conferred by statute, to be exercised only in the mode pointed out, and the attesting signature of the clerk is as material to the integrity and validity of the bonds as is that of the chairman of the board of county commissioners. The township had no power to bind itself for the purpose of aiding in the construction of a railroad, by subscription to its capital stock and the issue of bonds to pay for the same, except as authorized by this statute;

the board of county commissioners of the county did not represent the township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law. That law required the bonds to be executed in a particular manner, and the signature of the clerk is essential to the valid execution of them, even though he had no discretion to withhold it."

3. The coupons sued on, upon their face, refer to the number of the bonds from which they were so detached. When coupons detached from bonds purchased before maturity, upon their face refer to the bonds from which they purport to be detached, the purchaser is put upon inquiry for the bonds, and charge him with notice of all they contain. McClure *vs.* Township of Oxford, 94 U. S., 429, 433. If, however, as in this case, the coupons are without date, or place of execution, and do not contain any statement that they are interest coupons, or for interest due upon the certain precinct bonds, and there is no other designation of the bond upon which the payment is to be made except by number, and the same are signed by "Thomas Roch, Clerk," without any other designation, they stand as independent obligations of the precinct, and as issued without any authority whatever.

4. The said bonds do not contain any statement showing the special nature thereof as is required by said act. In the recitals it is stated that they were issued to aid the West Point Manufacturing Company in improving the water-power in the Elkhorn river, for the purpose of propelling public grist-mills, and *other works of internal improvements* of a public nature, in said West Point Precinct. The aid voted was for a two-fold purpose, and only one of the purposes is stated upon the face of the bond. The statement that the donation was to aid "other works of internal improvements of a public nature in said West Point Precinct," is too indefinite; there should be such

particular description of the works to be aided, to enable the purchaser to see by inspection of the bond that they were really of that character.

The State *vs.* Thorne, 9 Neb., 458, 460.

The failure of the bonds to contain a statement of *all* of the purposes for which the aid was voted is fatal to their validity.

Anthony *vs.* County of Jasper, 101 U. S., 693.
McClure *vs.* Township of Oxford, 94 U. S., 429.
Bissell *vs.* Township of Spring Valley, 3 Sup. Court Rep., 555.

And the purchaser, by reason of the failure of such statement, is put upon inquiry, and is charged with notice of any infirmities thereto attaching.

Fowler *vs.* Bently, 14 Pet., 318.
Harshman *vs.* Bates County, 92 U. S., 569, 575.
McClure *vs.* Township of Oxford, 94 U. S., 429.

The section of chapter 9 of the Revised Statutes for submitting the question of the issuing of such bonds to a vote of the legal voters, referred to in sec. 1 of said internal improvement act (Genl. Stat., 235, sec. 18) provides as follows:

"The mode of submitting questions to the people as contemplated by the preceding sections of this chapter, shall be as follows: The whole question, including the sum desired to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published for four weeks in some newspaper published in the county."

The aid voted under the submission of the proposition in accordance with said provision was for a double purpose according to the recitals in the bonds, to wit: to

improve the water-power of the Elkhorn river, for the purpose of propelling (1st) public grist-mills, and (2d) for "other works of internal improvement," but the only works of internal improvements of a public nature for which said bonds were so issued to the said West Point Manufacturing company, as averred by the plaintiff in his petition, "were the improvement of the water-power of the said Elkhorn river, for the purpose of propelling public grist-mills in said West Point Precinct." The issuance of the bonds for *only one* of the purposes named was in direct violation of the said vote, and of the statute. The bonds must be issued in accordance with the proposition submitted, and for the purpose for which they were voted.

Harshman *vs.* Bates County, 92 U. S., 569, 575.

Here there was clearly a partial failure of the consideration upon which the aid was voted, and a part of the series issued had no legal basis. Municipal aid bonds cannot be enforced *pro tanto*, according to the consideration; the entire series will either be upheld or declared void. The entire series of said precinct bonds must be based upon a legal statutory condition, and *all* the purposes for which they were voted must be stated in the bonds, otherwise they will be void.

Hamlin *vs.* Meadville, 6 Nebr., 227, 233, 235.

Reinman *vs.* C. C. and B. H. R. R. Co., 7 Nebr. 310, 314.

The plaintiff's averments (record p. 10) "that the improvement of the water power of the Elkhorn river, to aid which said bonds were issued and negotiated, consisted in constructing a canal for water power purposes in said West Point Precinct," is an admission that the bonds were in fact issued for a purpose *altogether* foreign for which they were voted, and were totally without any consideration. A canal for water-power purposes is

merely a race or channel dug to lead the water of a constructed and improved water power, from such water power to the water-wheel of a mill or factory. The water power proper is the damming up of a stream to a higher level than the bed of the stream below the dam, to create a pond or reservoir to supply the power; and a dug channel or race, or canal for water power purposes, merely leads the water from the pond or reservoir on such higher level to the water wheel, to propel the mill or factory.

There is still a further admission that is fatal to the validity of the bonds. It is averred that said improvement of the water power, "would and did render the water power of said river available and useful for propelling other works of internal improvement of a public nature, *which were*, or thereafter might be constructed and located upon said river in said precinct." If by this averment it is meant to state that said water power, as improved by the digging of said canal, was for the purpose of propelling "works" that *were already* built, then the bonds, for that reason, are void.

State *vs.* Thorn, 9 Neb., 458, 459.
Cooley on Tax, 78, 79, 102, 105.
Cooley C. L., 156-7, 607, 616.

Such aid would in effect be only a donation to a private enterprise, and without any authority.

Loan Association *vs.* Topeka, 20 Wall., 655.

Section 1 of the act for setting aside revenue arising from the taxation of works of internal improvements to pay the bonds to construct or complete them, referred to in the recitals of said bonds. (Comp. Stats., 438,) provides: "That if any township, precinct, incorporated city or village, in this State, shall issue any bonds to aid in the construction or completion of any works of internal improvement, the revenues arising from the taxation of such internal improvements shall be set apart forever to pay

the interest and principal upon said bonds until the same shall be fully paid," &c.

If, however, the aid voted is donated for "works" already built, no such "internal improvements" will be created for taxation purposes by reason of such donation, and this provision of the statute will accordingly be made nugatory.

This statute, at the time said aid was voted, and said bonds were issued, formed part of the said "internal improvement act," and it became just as necessary to comply with its requirements as with any of the other provisions of said internal improvement act.

7. The recitals in the bonds stating that the donation was to aid the West Point Manufacturing Company to improve the water power, for the purpose "of propelling public grist mills and other works of internal improvements," gives particular description of only a portion of the "works" to be aided. The special nature of "the other works" is not stated. The "work" particularly described in said recitals, are not works of "internal improvement," under the statutes of Nebraska, and the decisions of its courts prior to Traver *vs.* Merrick County, 14 Neb., 327, decided by a divided court, at the January term, 1883, and while this action was pending. In U. P. R. R. *vs.* Commissioners of Colfax County, 4 Neb., 456, decided at the January term, 1876, construed the said internal improvement act. In answer to the question: "What are works of internal improvement?" the court adopts the definition given in Mayor of Welumka *vs.* Newton, 23 Ala., 660: Where internal improvements under State authority are spoken of it is universally understood that works within the State, by which the public are supposed to be benefited, are intended; such as the improvement of highways and channels of travel and commerce. On page 456 of the opinion, the court holds: "Such works must be tested by the benefits to be derived

by the public from their construction, rather than by their extent or cost. A public road constructed through an otherwise impassable portion of the country, is a work of internal improvement; railways are said to be improved roads, constructed for public use, although owned by private corporations."

In Dawson County *vs.* McNamar, 10 Neb., 276, 280, 281, it is held: "The building of a court house, although an important and necessary county work, has never been classed among 'works of internal improvement,' by which is meant, as the term is here used, only those works within the State in which the *whole body of the people* are supposed to be more or less interested, and by which they may be benefited. And they more commonly have reference to 'improvement of highways and channels of travel and commerce.'"

In these decisions a grist mill was entirely left without the pale of the definition of "works of internal improvement." They are not of the nature of "public highways or channels of travel," nor are the "whole body of the people" interested in them. Only a class, that of farmers, out of the "whole body of the people," are interested in them, except in a general way, as all are interested in the growing of textiles for the manufacture of fabrics for clothing; or in the raising of cattle, for meat and hides; or of cereals, to be taken to the grist mill to be ground into meal and flour.

Following these decisions of the courts of Nebraska, this court has decided that "a steam or other kind of grist mill is" not "of the class of internal improvements which municipal townships in that State were empowered by the statute in question, to aid by an issue of bonds."

Osborn *vs.* County of Adams, 1 Sup. Court Rep., 168.

When this court has adopted a construction of a State

statute, before the State courts have passed upon it, a single decision of the State court holding adverse views, is not sufficient to cause it to change its views. No retroactive effect will be given to such State decision.

Rowan *vs.* Runnels, 5 How., 134.

In the case of Douglass *vs.* County of Pike, 101 U. S., 687, this court holds: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive." "We recognize fully not only the right of a State court, but its duty, to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested *before the change was made.*"

This case comes clearly within the rule announced in said cases of Rowan *vs.* Runnels, and Douglas *vs.* County of Pike *supra*; and the case of Osborn *vs.* County of Adams, *supra*, holding that a grist-mill is no work of internal improvement in the State of Nebraska, will control this case; and the "grist-mill" for which the aid was voted and the bonds were issued, will be held not to be a work of "internal improvement," and that the bonds are without a legal basis and void.

URIAH BRUNER, and
R. F. STEVENSON,
Counsel for Cuming County.